LEE TSING CHOY

v.

JOHARI JAALAM

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. 965 OF 1982]
25 NOVEMBER 1983

CIVIL PROCEDURE: *Setting aside judgment in default - Mistake of defence solicitor - Stay of proceedings - Liberty to amend defence and the inclusion of a counterclaim - Rules of the High Court 1980, O. 14 r. 11, O. 18 rr. 2(1) & (2), 20, O. 20 r. 3(1).*

The plaintiff filed a writ on 26 May 1982 claiming a sum of RM26,772 from the defendant being the balance of materials supplied, installed and services rendered. The writ was served, and the defendant's solicitors filed the appearance and defence thereafter. The plaintiff's solicitors proceeded to file a summons-in-chambers under O. 14 in respect of the sum claimed. When the said summons-in-chambers came up for hearing, neither the defendant nor his solicitor was present wherein the Senior Assistant Registrar who heard the application entered judgment in default against the defendant.

The defendant thereafter applied to:

(1) set aside the judgment on the grounds that the hearing date was wrongly entered in the Court diary of the defendant's solicitors.

(2) stay all further proceedings.

(3) liberty to amend defence and inclusion of counterclaim.

Held:

[1] The Court can exercise discretion in setting aside judgment in default and in so doing must be satisfied with two requirements: Firstly, as to the reason that resulted in the default and secondly, the defendant must show triable issues.

[2] Mistake of solicitor can be a valid basis for setting aside the judgment in some cases.

[3] Amendment of pleadings after the close of pleadings is within discretion of Court unless:

(i) the application is not *bona fide*;

(ii) the proposed amendment will prejudice the other party which cannot be compensated by costs; or

(iii) the proposed amendment will turn the character of the suit into one of entirely different character.

[4] Inclusion of a counterclaim for the first time after the close of pleadings is undesirable.

[Judgment set aside. Defendant given leave to amend defence. Application to include counterclaim dismissed.]

Cases referred to:
United Malayan Banking Corporation Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors. [1983] 1 MLJ 206
Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58
Tong Lee Hwa & Anor. v. Malayan Banking Bhd. [1978] 1 MLJ 257
Chong Kueng Yin & Ors. v. Lovis Lavagna [1972] 1 MLJ 180
Gatti v. Shoosmith [1939] 3 All ER 916
John Wallingford v. The Directors of the Mutual Society [1880] AC 685
Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors. [1983] CLJ (Rep) 428
Khan Kan Chee v. Loke Wan Yat Realty Sdn. Bhd. [1974] 1 MLJ 206

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 11, O. 18 rr. 2(1), (2), 20, O. 20 r. 3(1)

Other source referred to:
Supreme Court Practice, 1982, vol. 1, p. 189, para. 14/11/1

For the plaintiff - Chew Biman; M/s. Chew Biman & Co.
For the defendant - Sri Ram (Liza Chan with him); M/s. Megat Najmuddin Leong & Co.

JUDGMENT

Zakaria Yatim J:

This is an application by the defendant (1) to set aside judgment in default entered against him by the Senior Assistant Registrar on 19 May 1983; (2) for a stay of all further proceedings in this suit and (3) for liberty to amend the defence as per amended defence and counterclaim.

In this case the plaintiff filed a writ on 26 May 1982, claiming a sum of RM26,772 from the defendant being the balance of materials supplied, installed and services rendered together with interests and costs. The writ was served on the defendant on 11 August 1982. Two days later the defendant entered an appearance. The defence was filed on 3 September 1982. On 19 November 1982, the plaintiff filed an application by summons-in-chambers for judgment under O. 14 of the Rules of the High Court 1980 in respect of the sum claimed. The summons-in-chambers was duly served on the defendant's solicitors on 21 March 1983. On the date of hearing of the summons-in-chambers, neither the defendant nor his solicitor was present. The Senior Assistant Registrar, who heard the application, entered judgment in default against the defendant.

Under O. 14, r. 11, the defendant can apply to the Court to set aside the judgment in default. The Court has the discretion whether to allow or refuse the application. In exercising its discretion, the Court has to be satisfied with two requirements. Firstly, the Court has to be fully satisfied as to the reason for his non-attendance at the hearing of the summons-in-chambers on 19 May 1983, *Supreme Court Practice*, 1982, vol. 1, p. 189, para. 14/11/1. Secondly, the defendant must show the Court that his defence raises triable issues. *United Malayan Banking Corporation Bhd. v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.* [1983] 1 MLJ 206 .

With regard to the first requirement, the defendant's solicitor filed an affidavit (enclosure 11) in support of his application, explaining as to why the solicitors were absent on the date of hearing. According to the affidavit, due to the inadvertence on the part of the solicitors' office, the date of hearing of the application was entered wrongly in their Court diary. Instead of entering the correct date, the date entered was 19 July 1983. It was due to this mistake,

that the defendant's solicitors failed to appear in Court on the date of the hearing. They only discovered the mistake when they were served with a copy of a draft order obtained on 19 May 1983. In my opinion, the defendant's solicitors had given a reasonable explanation as to why they were absent on the date of the hearing. It was a genuine mistake. I have no reason to believe that the mistake was deliberately made. Furthermore, there was no evidence that the defendant or his solicitors were acting in bad faith.

Counsel for the plaintiff argued that the mistake of a solicitor was not a good ground for the Court to exercise its discretion to set aside judgment in default. In support of his argument, he cited *Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58; and *Tong Lee Hwa & Anor. v. Malayan Banking Bhd.* [1978] 1 MLJ 257. These two cases were concerned with applications for extension of time to serve notices of appeal on the respondents. In both cases, the applicants failed to serve notice of appeal on the respondents within the prescribed time due to the mistakes of the solicitors and a solicitor's clerk. The Federal Court refused their applications because the applicants failed to comply with the strict requirements of the rules relating to notice of appeal.

Indeed, in *Chong Kueng Yin & Ors. v. Lovis Lavagna* [1972] 1 MLJ 180; Suffian FJ (as he then was) said:

> Before 1909, the English Court of Appeal had no discretion to grant leave if the appellant was out of time owing to a mistake of his legal adviser ... The law here ... is the same as the pre-1909 English law: the mistake of a legal adviser is not a sufficient ground for granting leave.

These cases are, therefore, not applicable to the present case.

In England, the relevant rule of the English RSC was amended in 1909. This amendment gave the English Court of Appeal the discretion to grant leave if the applicant was late in entering his appeal due to the mistake of his solicitors. This is clearly laid down in *Gatti v. Shoosmith* [1939] 3 All ER 916. In this case, the applicant was a few days late in entering an appeal. The intention to appeal had been notified to the respondent's solicitors within the time specified by the rule. The applicant asked that the time be extended on the ground that the failure to enter the appeal within the time limited was due to the mistake of a legal adviser. The Court of Appeal held that on the facts of the case, it had the discretion to grant leave to appeal. Sir Wilfrid Greene M.R., in his judgment, said:

> On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to the mistake on the part of a legal adviser, may be a sufficient cause to justify the Court in exercising its discretion. I say 'may be,' because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this Court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.
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> The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised. If ever there was a case in which it should be exercised, I should have thought it was this one. We are not, I think, concerned here with any question at all as to the merits of this case or the probability of success or otherwise. The reason for the appellant's failure to institute his appeal in due time, and the fact that the notice of appeal was not served within the strict

> time, was a mere misunderstanding, deposed to on affidavit by the managing clerk of the appellant's solicitors - a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal. That was done within the strict time, was due entirely to this misunderstanding. On the facts of this case, it appears to me that the case is one where the discretion of the Court ought to be exercised, and, accordingly, leave will be given.

In the instant case, the mistake of the solicitor did not preclude the defendant from applying to the Court to set aside judgment in default and explaining the non-appearance of the defendant or his solicitor on the date the judgment was entered. Under O. 14 r. 11, the Court has the discretion to consider whether there is any reasonable explanation as to why the defendant or his solicitor did not appear at the hearing of the application. I have found that the explanation of the defendant's solicitor was satisfactory and the mistake was a genuine mistake. In view of the decision in *Gatti's* case, *supra*, I think this is a proper case where the mistake of a solicitor is a ground for the Court to exercise its discretion.

The next question to consider is whether the defence raises triable issues. The defence that was filed on 3 September 1983 did not raise any triable issue at all. It merely denied the plaintiff's claim. A mere general denial that the defendant was indebted would not suffice. *Supreme Court Practice, supra*, p. 167. See also *John Wallingford v. The Directors of the Mutual Society* [1880] AC 685 at 704.

Since the defendant failed to raise any triable issue in his defence filed on 3 September, 1982, his only alternative was to rely on the proposed amended defence and counterclaim. But before the Court could examine the amended defence and counterclaim, it had first to decide whether the defendant's application for liberty to amend his defence should be allowed. Counsel for the defendant argued that his client was entitled to amend the defence and include the counterclaim as of right. In support of his argument he referred to O. 20 r. 3(1), which allows a party to amend any pleading at any time before the pleadings are deemed closed. According to him, when the summons under O. 14 was served on his client, time was automatically extended by virtue of O. 18, rr. 2(1) & (2). I am unable to accept this argument. Under this rule time is automatically extended if the summons was served on the defendant before the defendant served his defence. As already stated, the defence was filed on 3 September 1982. It could be presumed that the plaintiff had been served with the defence on the date it was filed because, in his affidavit in support of the application under O. 14, he relied on this statement of defence, which he said, disclosed on defence. The application under O. 14 was only served no the defendant on 21 March 1983 long after the defence was served on the plaintiff. Therefore, time for pleadings was not automatically extended in this case. Instead, pleadings were deemed to be closed sometime in September, 1982 since there was no reply to the defence. [O. 18 r. 20].

Since pleadings were closed, the defendant could only amend his defence with the leave of this Court. He had rightly done so by filing this application for liberty to amend the defence.

The Court has the discretion to allow amendment of pleading at any time after the close of pleadings, but before the trial, provided that such amendment does not cause injustice to the other party. Injustice will result to the other party if (i) the application is not *bona fide;* (ii) the proposed amendment will prejudice the other party which cannot be compensated by costs; or (iii) the proposed amendment will turn the character of the suit into one of entirely different character. *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] CLJ (Rep) 428 and *Khan Chee v. Loke Wan Yat Realty Sdn. Bhd.* [1974] 1 MLJ 206.

In the proposed amended defence, the defendant stated that the plaintiff, in breach of an agreement concluded between them, failed to complete the works within the time stipulated. He alleged that the plaintiff had carried out the work negligently, as a result of which he had to incur additional expenses. He also complained that the plaintiff failed to complete the work. The defendant also pleaded to set-off the additional expenses incurred by him against the plaintiff's claim. In her affidavit (enclosure 11) in support of the application, the defendant's solicitor explained that she was unable to obtain instructions from the defendant because he was away. She was only able to obtain final instructions from the defendant to amend the defence just before the application was made. She further averred that the defendant had merits in his defence. In my opinion, the application to amend the defence was made in good faith. If the amendment was allowed, the plaintiff could be compensated by costs. Furthermore, the amendment did not turn the character of the suit into one of an entirely different character. Therefore, no injustice would be caused to the plaintiff if the amendment was allowed.

In the proposed amended defence, the defendant also included a counterclaim, where he was claiming from the plaintiff a sum of RM7,000 less retention overpaid to the plaintiff which was not done. The counterclaim was introduced for the first time after the close of the pleadings. I entirely agree with the view expressed by Mohamed Azmi J (as he then was) in the *Khan Kan Chee's* case, *supra*, where he said:

> I had occasion to express my doubt as to the desirability of allowing a counterclaim to be included for the first time after the close of pleadings, as I was of the view that a distinction should be made between amendment of a counterclaim which had already been set up in the original defence and an application to include a counterclaim for the first time.

In that case he dismissed the application to include a counterclaim against the plaintiff for the first time.

In the circumstances, I allow the defendant leave to amend his statement of defence as proposed, but dismiss his application to include the counterclaim.

Having given leave to the defendant to amend the defence as proposed in the application, the Court may now examine whether the amended defence contains any triable issues for the purpose of setting aside the judgment in default dated 19 May 1983. In the amended defence, the defendant alleged that the plaintiff had failed to complete the works within the prescribed time as stipulated in the agreement. It was also alleged that the plaintiff had been negligent in carrying out the work, as a result of which the defendant suffered financial loss. The plaintiff also failed to carry out the finishing work. The defendant also pleaded a defence of set-off against the plaintiff. In my view, the amended defence clearly disclosed triable issues.

For the reasons given above, I order that the judgment in default, entered on 19 May 1983, be set aside. The application in respect of prayer 2 is no longer relevant. The amended defence should be filed within fourteen days from the date of this judgment. The costs of this application should be borne by the defendant in any event.

Also found at [1984] 1 CLJ 94